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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

No. 359.—October Term, 1932

Mary Rocco, as Executrix of the Last Will and Testament of Joseph Rocco, deceased,

against

Lehigh Valley Railroad Company, Petitioner

PETITION FOR REHEARING

The Lehigh Valley Railroad Company hereby presents its petition for a rehearing in the above entitled cause.

The following is a statement of the grounds upon which this petition is based.

It is respectfully urged that in imposing upon railroads, and in permitting a jury to impose upon railroads, a duty to warn an employee engaged in Rocco's duties, at every curve, and to have its trains under control at every curve, this Court has so far departed from every pronouncement on the subject as seriously to impair the ordinary and customary operation of a railroad. Since all railroads are now patrolled by some manner of vehicle, the importance of this decision is manifest.

To confine the doctrine of the Nixon case, 271 U. S. 218, to straight stretches of track, and to require on curves the sounding of whistles, and having trains under control, for the benefit of track inspectors whose duty it is to obtain information of oncoming trains and avoid them, is to require the operation of trains in a manner similar to the operation of automobiles. It was held in the Nixon case, which applied to a single track road, that there was no duty whatsoever to keep on the lookout for track inspectors on similar vehicles, and thus there was no duty to give warning to a track in-

spector slowly moving on his tricycle, while the train which killed him rapidly bore down on him from behind. This Court now seemingly disregards the theory of the Nixon case that railroads are primarily operated for train movements.

To have a train under control at a curve necessarily means to operate it at a speed which will permit stopping it in time to prevent a collision. For Rocco's benefit this Court has held the whistle should have been continuously blown on this road having many curves, and each curve should have been rounded at a speed which would have permitted a stop in time to avoid Rocco.

The opinion in the case at bar departs from that doctrine which has its statement in Chesapeake & Ohio v. Mihas, 280 U. S. 102. We refer to the following sentence contained in the opinion in the case at bar:

> "We think these facts required that the jury should determine whether the motorman exercised reasonable care to have his train under control, to sound a warning before entering the curve, and to be on the lookout for workmen whose presence might be expected on the day in question, when the waters of the lake were washing over the tracks at this point and inspection and repair might be required."

Rocco's daily duties were to inspect and make minor repairs on the track. The whole branch line was, and now is, patrolled in like manner and with like equipment. On the date of the fatal accident, and at the point of the accident, there was no deviation from the normal. There were no extraordinary circumstances. The train was late, but Rocco must be charged with complete knowledge of its lateness. There was no washout at the place in question. Rocco was proceeding northerly in his customary and everyday manner. operating his three wheeled vehicle. The engineer is chargeable with only ordinary prudence. He knew of the rule which forbade Rocco occupying the track without ascertaining from the operator the whereabouts of approaching trains in both directions. He knew also of the written rule which provides as follows:

> "Employees must stand outside and clear of all main

tracks while trains are passing; they must expect trains to run at any time on any track in either direction. All employees are further warned that they must not rely on others to notify them of the approach of a train." (R. 139)

Both he and Rocco knew that the conditions at the curve in question were normal. The adequacy of the rules of the Company has not been attacked. Only the engineer's conduct has been brought into question. This Court has held in substance, that because he did not operate the train in a manner which might be required if there were workmen on the track, and if the tracks were washed out, his conduct was negligent. It is urged that the duty of the engineer and of the defendant, to Rocco, is not measured by conditions that might (but did not) exist at the curve, but by the actual conditions at the time and point of the accident.

The train was late, but that was normal so far as Rocco was concerned. The train was not proceeding at an excessive speed. There was no condition of the track at the point of the accident requiring repair. There were no workmen on the track at the point except Rocco, whose duties brought him there in the same conditions four times a day. This Court has, in substance, said that as to the decedent, there existed a duty of care equal to that which would have been required had there been a washout and had there been workmen engaged in repair.

Thus despite Rocco's contract of employment, which, by the rules, required him to avoid trains, and despite his violation of the rule requiring him to obtain knowledge of the whereabouts of trains, and even though conditions were normal at the particular point where the injuries occurred, this Court charges the railroad with a duty to give special warning to Rocco and to have the train under control for his benefit.

Writing in the case of Chesapeake & Ohio Railroad Company v. Mihas, this Court said:

". . . and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation

unless that duty or obligation was one owing to the complainant."

Reference was made in the Mihas case, to the Nixon case as stating the same proposition.

So the measure of care which the engineer owed to Rocco, is limited to Rocco personally under the conditions that existed at the particular location where the accident occurred. Since there was no washout, and since as to Rocco no condition existed except those conditions which existed, and now exist, at every curve at all times, it necessarily follows that the opinion in the Rocco case is absolute authority for the proposition that on every railroad, and at all times, on main lines and branch lines, there is a duty on the part of an engineer in approaching every curve, to blow a whistle for patrolmen and to have the train under control.

Main lines and branch lines are patrolled at all times by vehicles either operated by man power or by gasoline. At all times, patrol and inspection are necessary for the protection of life and property. Efficient operation under the rule of care adopted in the case at bar, is an impossibility.

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Supreme Court of the State of New York be, on further consideration, affirmed.

Respectfully submitted,

HOWARD COBB

HAROLD E. SIMPSON

Counsel for Petitioner.

CERTIFICATE OF COUNSEL

We, Howard Cobb and Harold E. Simpson, counsel for the above named Lehigh Valley Railroad Company, petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

HOWARD COBB

HAROLD E. SIMPSON